**Practical Aspects of Intl ADR (LAW-795AD-001)**

**AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW**

**Fall 2015**

*Wednesdays, 9:00am to 10:50am, from August 26 to December 2.*

**Professors Luke A. Sobota and Charles T. Kotuby Jr.**

**Course Description**

With the growth of the global economy and with foreign states actively involved in the commercial sector, there has been a concomitant rise in conflicts between investors and foreign states. These are high stakes disputes, raising delicate sovereign, diplomatic, and social issues for the foreign state and significant business, financial, and strategic issues for the company. Yet the legal regime governing these disputes is both complicated and underdeveloped. Issues such as immunity, choice of fora and choice of law create pitfalls and opportunities that call for creative counsel. The result is a rich factual and legal backdrop that provides the opportunity for students to learn the practical and strategic interplay of doctrine and fora, and how to manage parallel processes in complex disputes.

The focus of the course is on practical skills and strategic considerations over theory. The course will take students through a hypothetical dispute based upon realistic global scenarios so that they can master the practical and strategic problems present when a U.S. company becomes embroiled in a dispute with a foreign sovereign entity. The lectures will cover all of the substantive and procedural aspects of suing a foreign sovereign or sovereign entity in a U.S. court (like the Foreign Sovereign Immunity Act and the Act of State Doctrine). The course will also address the practical considerations of litigating in foreign courts, and the tools available for litigators to coordinate parallel U.S. and foreign litigation (like transnational discovery and antisuit injunctions). It will then explore commercial and treaty-based arbitration against foreign state-owned entities and states themselves, which may be pursued alternatively or in addition to U.S. and foreign litigation. As most disputes are ultimately mediated and settled, the course addresses the different ways by which the parties can reach a negotiated solution. Finally, the course reviews the issues surrounding asset attachment and recognition of judgment and arbitral awards against foreign sovereigns. Illustrating the practical and theoretical interplay among these scenarios, the focus will be on the strategic options presented at various junctures, as well as a focus on advocacy skills required across the domestic, foreign, and arbitral fora.

All of these issues will be considered through a single, intricate and simulated case. Every few weeks, the students will receive a detailed “case development” notice concerning some new facet of the case. After in-class discussion of the issues the relevant legal issues, the students will be divided into teams and tasked with preparing written and oral presentations—it may be a strategy session with a corporate general counsel or foreign attorney general, a pleading to a federal or foreign court, an arbitration memorial, or media or government outreach. The course thus offers students a balance of lectures, written advocacy and “stand up” experience before a varied audience, and the students will be assessed on their written and oral performance. The class will also include a tour and mock hearing at the International Centre for Settlement of Investor Disputes (ICSID), one of the world’s leading arbitral facilities.

**Course Contents**

**Week 1 (August 26): Transnational Litigation in U.S. Courts**

***Scenario*:** U.S. company contemplates litigation against foreign state-owned company in U.S. federal court.

***Lecture Issues*:** Foreign Sovereign Immunity; Act of State Doctrine

***Professional Practice Tip #1:*** Effective client advice: memoranda and meetings.

***Required Reading:*** *Terenkian v. Republic of Iraq,* 694 F.3d 1122 (9th Cir. 2012);*Republic of Argentina v. Weltover, Inc.*, 504 US 607 (1992); *Foremost-McKesson*, 905 F.2d 438 (DC Cir. 1990); *Rong. v. Liaoning Province Government,* 452 F. 3d 883 (D.C. Circuit 2006); *Banco Nacional de Cuba v. Sabbatino, etc., et al.*, 376 U.S. 398 (1964); *World Wide Minerals, Ltd., et al. v. Republic of Kazakhstan, et al.*, 296 F.3d 1154 (2002).

***Recommended Reading:*** Patrick Radden Keefe, *Buried Secrets*, The New Yorker, July 8, 2013.

***Practicum Assignment #1:*** Class is split intogroups of three people, some groups to represent the U.S. company and others to represent the foreign state-owned company. Each team will prepare a memorandum and presentation for its client regarding strategy, goals, likelihood of success, additional facts needed, potential obstacles/defenses, and plans for media and government outreach. The memorandum will be due September 6; students will “pitch the case” to their client in class on September 9.

**Week 2 (September 2): International ADR: International Commercial Arbitration, Investment-Treaty Arbitration, and International Mediation**

***Scenario*:** U.S. company contemplates arbitration and mediation against the state and its state-owned company.

***Lecture Issues*:** Contract arbitration and available fora; treaty arbitration and available fora; mediation or “med-arb”; fork in the road issues; injunctions against arbitration; interim measures.

***Required Reading:*** *Republic of Ecuador v. ChevronTexaco Corp*., 376 F. Supp. 2d 334 (S.D.N.Y. 2005); *Republic of Ecuador v. ChevronTexaco Corp*., 499 F. Supp. 2d 452 (S.D.N.Y. 2007); *Republic of Ecuador v. ChevronTexaco Corp*., 2010 WL 1028349 (S.D.N.Y. 2010; Rennie & Sherwin, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 Am. Rev. of Int’l Arb. 317 (2010); Jan Paulsson, *International Arbitration is Not Arbitration*, 2 (2008) Stockholm Int’l Arb. Rev. 1 (2008); Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts*, World Arbitration & Mediation Review, Vol. 2, p. 39, 2009; *Mediation of Investor-State Conflicts*, 127 Harv. L. Rev. 2543 (2013-2014); Bryan Garner, *10 Tips for Better Legal Writing*, ABA Journal (1 October 2014).

***Optional Reading:*** *Smith/Enron Cogeneration Limited Professionalship, Inc. v. Smith Cogeneration International*, 198 F.3d 88 (2nd Cir. 1999); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymount Inc.*, 473 U.S. 614 (1985); *Salini v Morocco* (ICSID Case No Arb/00/04) (Decision on Jurisdiction, 23 July 2001),Linda Silberman, *International Arbitration: Comments from a Critic*, 13 American Review of International Arbitration 9 (2002).

**Week 3 (September 9): Strategy in International Dispute Resolution**

***Practicum #1:*** Students present their strategy memorandum to the client.

**Week 4 (September 16): International Commercial Arbitration (Jurisdiction)**

***Scenario*:** U.S. company seeks commercial arbitration against the state-owned company.

***Lecture Issues*:** Jurisdiction and the agreement to arbitrate: capacity and formation.

***Professional Practice Tip #2:*** How to present oral argument in international arbitration.

***Required Reading:*** Alan Redfern, J. Martin Hunter, Nigel Blackaby and Constantine Partisides, Redfern and Hunter on International Arbitration, 5th ed. (2009), Ch. 2 and Ch. 5(D); Gary Born, International Commercial Arbitration, 2d ed. (2014), §§ 1.02(B), 1.04(E), 5.01(B), 5.03(E), and 5.04(D).

***Recommended Reading:*** Alok Jain, *Pathological Arbitration Clauses and Indian Courts*, Journal of International Arbitration, Kluwer Law International, 25:4 (2008); *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23; [2008] SGHC 134; *Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd and Another* [2005] SGHC 91; Judgment of the Swedish Court of Appeal, Case No. T 2454-14 (23 January 2015); *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5.

***Practicum Assignment #2:*** Students will assume the role of Claimant and Respondent and prepare an outline of arguments on jurisdiction based on additional research of jurisprudence and scholarly publications. They will present their arguments in a mock hearing on jurisdiction in a commercial arbitration on 30 September.

**Week 5 (September 23)**

***Yom Kippur*** *(classes cancelled; offices open)*

**Week 6 (September 30): International Commercial Arbitration (Jurisdiction) (Cont’d)**

***Practicum #2:*** Teams participate in a hearing on jurisdiction in a mock international commercial arbitration.

**Week 7 (October 7): Investor-State Arbitration (Merits)**

***Scenario*:** U.S. company files an arbitration demand against foreign state under the relevant BIT.

***Lecture Issues*:** The meaning of an “investment”; expropriation.

***Professional Practice Tip #3:*** How to draft a written submission in international arbitration.

***Required Reading:*** Rudolf Dolzer and Cristoph Schreuer, Principles of International Investment Law (2008), Chapters 3 and 6; *Empresas Lucchetti, SA and Lucchetti Peru, SA v. Peru*, ICSID Case No. ARB/03/4, Award, 7 Feb 2005**;** *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3.

***Suggested Reading:*** Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EJIL 121, 123 (2006); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements***,** 12 U.C. Davis J. Int’l L & Pol’Y 157 (2005); Ryan Mellske, *“For Greater Certainty”: Calibrating Investment Treaties to Protect Foreign Investment and Public Health*, 30 Md. J. Int'l L. 82 (2015).

**Week 8 (October 14): Investor-State Arbitration (Merits) (Cont’d)**

***Lecture Issues:*** Fair and equitable treatment; denial of justice.

***Professional Practice Tip #4:*** How to draft a motion/answer before a U.S. court.

***Required Reading:*** Rudolf Dolzer and Cristoph Schreuer, Principles of International Investment Law (2008), Chapter 7; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001), pp. 1 – 6, 10 – 18, 74 - 96; *Saluka Investments B.V. v. The Czech Republic*, Partial Award (17 Mar. 2006) 60 – 93; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award (8 June 2009), pp. 231 – 268; *Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador*, Partial Award on the Merits (30 March 2010) (pp. 10-26, 85-104) and Opinion of Jan Paulsson (12 March 2012).

***Suggested Reading:*** Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. Int'l L. & Pol. 43 (2010); *Neer v. Mexico*, 4 R. Int’l Arb. Awards (15 Oct. 1926); *PSEG Global, Inc. and another v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 Jan. 2007); Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners* (2010) 1 J. Int'l Dispute Settlement 341; Mark Friedman, *Pleadings, Memorials and Post-Hearing Briefs*, *in* Bishop and Kehoe, eds., The Art of Advocacy in International Arbitration, 2d ed. (2010), Ch. 9.

**Week 9 (October 21): Developing a Record through International Discovery**

***Scenario*:** U.S. company wants to develop a factual record for the BIT arbitration. The former Deputy AG of the foreign state now lives in the United States.

***Lecture Issues*:** U.S. discovery for foreign proceedings (§1782), proof of foreign law (FRCP 44.1); Hague Conventions.

***Professional Practice Tip #5:*** How to argue a motion/answer before a U.S. court.

***Required Reading:*** *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004);*In re Oxus Gold plc*, MISC No. 06-82-GEB, 2007 WL 1037387 (D.N.J. Apr. 2, 2007);*In re Chevron Corp*., 709 F. Supp. 2d 283 (S.D.N.Y.), aff’d 629 F.3d 297 (2d Cir. 2010); *In re Veiga*, 746 F. Supp. 2d 8, 25 & 2010 WL 4340564 (D.D.C. 2010); *Bodum USA, Inc. v. La Cafetiere, Inc*., 621 F.3d 624 (7th Cir. 2010).

***Practicum Assignment #3:*** Class is split intogroups of three, with some groups representing the U.S. company and others representing the foreign state-owned company. The former drafts a motion and memorandum of law seeking Section 1782 discovery; the latter prepares the same opposing it; due October 26.

**Week 10 (October 28): Developing a Record Through International Discovery (Cont’d)**

***Practicum #3*:** Teams present oral arguments to a mock judge in a U.S. Federal Court supporting and opposing the discovery under §1782.

***Practicum Assignment #4:*** Class is split intogroups of three, with some groups representing the U.S. company and others representing the foreign state-owned company. Teams begin researching international investment law and drafting arguments in support of claims/defenses on the merits at a mock hearing on the merits in an investment-treaty arbitration. Memorials on the merits will be due on November 25. The mock hearing will take place on December 2.

**Week 11 (November 4): Mediation and Settlement**

***Scenario*:** Both the U.S. company and the foreign entities reach out to their respective counsel requesting advice on how and on what terms the dispute might be settled.

***Lecture Issues*:** Mediation theory and practice; integration of mediation into investment arbitration; mediation skills; mediation process; mediation rules; mediator strategies; voluntary versus compulsory mediation; mediation versus conciliation; confidentiality in mediation; enforcement of settlement agreements

***Professional Practice Tip #6:*** How to prepare a mediation statement.

***Required Reading:*** Nancy A. Welsh and Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 Harv. Negot. L. Rev. 71 (2013); Susan Franck, *Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*, ICSID Review, Vol. 29, No. 1, (2014); Susan Franck and Anna Joubin-Bret, *Investor-State Mediation, A Simulation,* ICSID Review, Vol. 29, No. 1 (2014); Frauke Nitschke, *IBA’s Mediation Rules and the ICSID Investment Dispute Settlement Framework,* ICSID Review, Vol. 29, No. 1 (2014); 2012 IBA Investor-State Mediation Rules; 2014 ICC Mediation Guidance Notes.

***Recommended Reading:*** Anna Joubin-Bret and Barton Legum, *A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules*, ICSID Review, Vol. 29, No. 1 (2004); Carolina Secondo Maglia, *Why Not Mediation*?, 7 Disp. Resol. Int’l 159 (2013); Kimberlee K. Kovach, *The Evolution of Mediation in the United States: Issues Ripe for Regulation May Shape the Future of Practice*, *in* Nadja Alexander (ed), *Global Trends in Mediation*, 2d ed, Global Trends in Dispute Resolution, Volume 1 (2006); Lester Nurick and Stephen J. Schnably*, The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, ICSID Reports, Vol. 2 (1994).

***Practicum Assignment #5:*** Students will assume the role of Claimant, counsel for Claimant, Respondent, Counsel for Respondent, and Mediator. Each Party and its Counsel will prepare a mediation statement and send it to the mediator no later than 16 November. The Mediator will conduct a mediation according to the IBA Rules and attempt to facilitate a settlement during class on 18 November.

**Week 12 (November 11): Guest Lecture on Recognition and Enforcement of Arbitral Awards-Marike Paulsson**

Marike Paulsson,Director, International Arbitration Institute & Lecturer in Law, University of Miami School of Law. She is former counsel at Hanotiau & van den Berg in Brussels, Belgium, a boutique law firm focused on commercial arbitration and litigation. Previously she practiced at Freshfields Bruckhaus Deringer and Allen & Overy in Amsterdam, the Netherlands. She has authored several publications on international arbitration, including *ICCA's Guide to the Interpretation on the 1958 New York Convention*. She is currently writing her PhD at Leiden University on enforcement of annulled awards under the New York Convention.

**Week 13 (November 18): Mediation and Settlement (Cont’d)**

***Practicum #5*:** Opposing teams meet and conduct a mediation. Mediators to report the terms of settlement, if any, to Professors Kotuby and Sobota via e-mail.

**Week 14 (November 25): Investor-State Arbitration (Merits) (Cont’d)**

***Practicum #4a:*** Memorials on the Merits are due today.

***No Class:*** *Thanksgiving Holiday*

**Week 15 (December 2): Investor-State Arbitration (Merits) (Cont’d)**

***Practicum #4b:*** Mock hearing on the merits at ICSID (4-hour class).